Ky. Op. Atty. Gen. 92-ORD-1145, 1992 WL 541068 (Ky.A.G.)

***1** Office of the Attorney General
Commonwealth of Kentucky

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September 10, 1992

IN RE: Kimberly K. Greene/Bullitt County Public Schools

OPEN RECORDS DECISION

This matter comes to the Attorney General on appeal from the Bullitt County Public School's denial of Courier–Journal reporter, Joseph Gerth's, July 13, 1992, request to inspect "the final 1992 evaluation of ... [Superintendent George Valentine's] job performance."

In a letter dated July 16, 1992, Mr. Valentine denied Mr. Gerth's request, relying on KRS 61.878(1)(a). It was his position that "releasing this type of personal information would constitute an unwarranted invasion of personal privacy."Continuing, he observed:

> The release of that information would set a precedent for the release of other personnel records which is also an unacceptable invasion of personal privacy.

He therefore declined to release the evaluation.

On behalf of her client, The Courier–Journal, Ms. Kimberly K. Greene appealed to the Attorney General, pursuant to KRS 61.880(2), the Bullitt County Public School's denial of Mr. Gerth's request. It is her position that disclosure of the records would not constitute "a clearly unwarranted invasion of personal privacy" inasmuch as "the performance of the superintendent is the same as the performance of the system itself."Ms. Greene cites OAG 77–69, in which this Office held that communications between the superintendent of the Jefferson County Public Schools and the Jefferson County Board of Education, relative to the Superintendent's plans for future measures in the school district presented in support of his candidacy for reappointment, should take place in a public meeting, and that a written memorandum outlining those plans should be made available for public inspection. She argues that Mr. Valentine's evaluation "necessarily must discuss his operation of the school system.... The public has an intense and legitimate interest in Mr. Valentine's performance of his job."

The single question presented in this appeal is whether Mr. Valentine properly invoked KRS 61.878(1)(a) to authorize nondisclosure of his performance evaluation. For the reasons set forth below, we conclude that Mr. Valentine improperly denied Mr. Gerth's request in toto. The public's interest in reviewing those portions of the evaluation which have a direct bearing on his management of the school system, and the progress of the school system generally, is superior to the reduced expectation of privacy in that document which Mr. Valentine, as superintendent of the public schools, might have. Only those portions which contain personal information, the release of which would serve no

legitimate public interest, are exempt from public inspection. The Bullitt County Public Schools may exercise its discretion in redacting any portion of the evaluation which it deems of a purely personal nature, pursuant to KRS 61.878(4), but must release the remaining portions of the evaluation forthwith.

***2** This Office has traditionally taken the position that the evaluations of public employees are excepted from the general rule of public inspection by operation of KRS 61.878(1)(a), (g), and (h). OAG 77–394 (university professor); OAG 78–738 (university professor); OAG 79–348 (teacher); OAG 80–58 (policeman); OAG 82–204 (university professor); OAG 82–211 (university professor); OAG 86–15 (teacher); OAG 89–90 (teacher); OAG 91–62 (branch manager). These opinions were premised on the notion that an evaluation is a matter of opinion and does not represent any action on the part of the agency. KRS 61.878(1)(g) and (h), now codified as KRS 61.878(1)(h) and (i). Accordingly, the only information to which the public is entitled is information relating to the action which the agency takes in light of the evaluation. Moreover, we have recognized that the privacy interests protected by KRS 61.878(1)(a) are as much those of the evaluator as those of person being evaluated, since the evaluator generally makes his evaluation with the understanding that it will be kept confidential. OAG 79–348; OAG 86–15.

On at least one occasion, however, the Attorney General has held that a performance evaluation is a matter of public concern, and should be available for inspection. In OAG 90–1, we ordered the release of the annual evaluation of the chief of the Louisville Police Department, noting that "[t]he people have a vital interest in the performance of the top leadership of police departments."While this opinion may be distinguished on the basis of the exceptions invoked, KRS 61.878(1)(g) and (h) as opposed to KRS 61.878(1)(a), and the existence of the City ordinance directing publication of the evaluation, it suggests that there is a significant public interest in the disclosure of such a document when it relates to a public officer who occupies a leadership position.

We believe that the reasoning of the Supreme Court in its recent decision, Kentucky Board of Examiners of Psychologists v. The Courier–Journal and Louisville Times Company, Ky., 826 S.W.2d 324 (1992), is instructive. In that opinion, the Court enunciated a clear test for analyzing the propriety of invoking the privacy exception. The Court observed:

> [G]iven the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. The statute contemplates a case-specific approach by providing for de novo judicial review of agency actions, and by requiring that the agency sustain its action by proof. Moreover, the question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context.

Those "antagonistic interests" are characterized as the public's interest in knowing whether its agencies are properly executing their statutory functions and its public servants are serving the public, and the individual's or individuals' interest in the disclosure of records which touch upon the intimate or personal features of their lives. Fundamental to this "comparative weighing of antagonistic interests" is the recognition that "the policy of disclosure is purposed to subserve the public interest, not to satisfy the public's curiosity." Board of Examiners, supra at 328.

***3** We have examined the document which gives rise to the appeal. It describes, in exemplary terms, Superintendent Valentine's performance as it relates to his relationships with the Board of Education, the community, and the staff. In addition, the Superintendent is evaluated on his leadership skills, business and finance skills, and personal qualities. A number of the criteria on which he is evaluated, including but not limited to those set forth in the "Personal Qualities" section of the document, do not relate to the operation and management of the school system. The public's interest in knowing that the system is executing its statutory function, and Superintendent Valentine serving the public, is not subserved by release of such information. The remainder of the evaluation, insofar as it relates to the Superintendent's performance relative to the school system generally, is a matter of considerable public interest, and should be released.

We do not, in so holding, establish a rule of general application vis-a-vis performance evaluations. Nor do we depart from any opinion previously issued by this Office. [FN1] Because the Superintendent is ultimately responsible for the management of the school system, his performance is of far greater interest to the public, and his expectation of pri-

vacy in the evaluation of that performance is correspondingly reduced. The same cannot be said of the other employees of a school system or any other public agency, since disclosure of their evaluations may spur unhealthy comparisons, breeding discord in the work place, and result in injury and embarrassment to the employee. We continue to ascribe to the view that an employee's right of privacy in his evaluation is superior to the public's interest in inspecting that evaluation. Our decision is limited to the facts presented in this case.

We concede that this issue is one of considerable ambiguity, and that reasonable minds may differ as to the propriety of releasing the evaluation. [FN2] In light of the Court's decision in Board of Examiners, supra, and the rules of construction governing the Open Records Act, we believe that ambiguous cases must be resolved in favor of disclosure. Here, we find that the potential harm to Mr. Valentine's privacy interest from disclosure of his performance evaluation is outweighed by the public's interest in disclosure of the requested information to the extent that that information pertains to his supervision of the Bullitt County Public Schools. Any material in the evaluation which is deemed by the Bullitt County Public Schools to constitute information of a personal nature may be masked, or redacted, pursuant to KRS 61.878(4), prior to the release of the record.

Ms. Greene and the Bullitt County Public Schools may challenge this decision by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882.

Chris Gorman
Attorney General

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Assistant Attorney General

[FN1] In OAG 91–161 we sustained the action of the University of Louisville in withholding a document described as the Board of Trustee's annual evaluation of the president of the University. In that opinion, however, we concluded that no final evaluation was generated, and that the document which was the subject of the appeal was prepared by the Chairman, for purposes of reference, in his remarks to the full Board, and was therefore a preliminary document within the meaning of KRS 61.878(1)(g) and (h).

[FN2] Multistate and federal court research reveals a split of authority on this issue. A number of courts have determined that release of performance evaluations represents a significant invasion of privacy, and is therefore improper. See, e.g., Vaughn v. Rosen, 383 F.Supp. 1079 (D.D.C.1974); Metropolitan Life Ins. Co. v. Usery, 426 F.Supp. 150 (D.D.C.1976); Celmins v. U.S. Dept. of Treasury, 457 F.Supp. 13 (D.D.C.1977); Ripskis v. Department of Housing and Urban Development, 746 F.2d 1 (D.C.Cir.1984); Trahan v. Larivee, La., 365 So.2d 294 (1978); Webb v. City of Shreveport, La., 371 So.2d 316 (1979); Collins v. Camden County Department of Health, N.J., 491 A.2d 66 (1984); Chairman, Criminal Justice Commission v. Freedom of Information Commission, Conn., 585 A.2d 96 (1991). Other courts have reached the opposite conclusion. See, e.g., Akron Standard Division of Eagle–Picher Industries, Inc. v. Donovan, 780 F.2d 568 (6th Cir.1986); Common Cause v. NRC, 674 F.2d 921 (D.C.C.1982); West Hartford Board of Education v. Connecticut State Board of Labor Relations, Conn., 460 A.2d 1255 (1983); Ollie v. Highland School District Number 203, Wash.App., 749 P.2d 757 (1988); Municipality of Anchorage v. Anchorage Daily News, Alaska, 794 P.2d 584 (1990). These courts typically recognize that because public officials are subject to public scrutiny in the performance of their public duties, the public's right to monitor their performance is superior to any privacy interest they have in their evaluation.

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